

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DAWN WHALEN</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 227,911
<b>KANSAS CHILDREN'S SERVICE LEAGUE</b>	)	
Respondent	)	
AND	)	
	)	
<b>OAK RIVER INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict on November 13, 1997.

**ISSUES**

The sole issue on appeal is whether the claimant has established that she was an employee of respondent Kansas Children's Service League.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

For the reasons stated below, the Appeals Board concludes that the Order by the Administrative Law Judge granting claimant's request for medical treatment should be affirmed.

Claimant testified at the preliminary hearing of November 12, 1997, that she was employed by Kansas Children's Service League as a foster parent. She stated

as a foster parent she took care of the everyday needs of a foster child including taking the child to court as needed. She identified what she called a contract of employment which was introduced as claimant's Exhibit 1. The agreement specified claimant's duties as a provider of foster care.

Claimant was injured when the leg of the foster child gave out as claimant escorted the child to the bathroom. Both claimant and the child fell. Claimant reported the accident on the daily log she was required to keep as a part of her responsibilities.

Respondent contends that claimant was not an employee and cites in support the case of Mitzner v. State Dept. of SRS, 257 Kan. 258, 891 P.2d 435 (1995). In that case, the Kansas Supreme Court held that a foster parent was not an employee of the State of Kansas. The Board does not, however, consider that case controlling here. The foster parenting system has since changed. The system is now a privatized system operated by such private organizations as Kansas Children's Service League. K.S.A. 39-708c *et seq.* The full extent of the differences is not developed in the records of this case.

The Board must rely on the evidence introduced at the hearing in this case. That evidence shows the respondent had the right to control the conduct of claimant as a foster parent. Under Kansas law, employment is established by establishing the right to control. Falls v. Scott, 249 Kan. 54, 815 P.2d 1104 (1991).

Respondent contends that claimant has failed to establish an employment contract. According to the respondent, the right to control is not relevant unless that initial employment agreement is shown. The Board does not agree with the premise of the argument. Employment is established by establishing the right to control. The right to control is by agreement. The evidence which establishes agreement between the parties relating to that right to control establishes an employment contract. In addition, the evidence in this case includes a written agreement. Whether that agreement is an employment agreement depends upon the extent to which it establishes the right to control the manner or method by which claimant performs her duties. The Appeals Board concludes the agreement establishes the right to control indicative of an employment relationship. The Appeals Board therefore finds that claimant was an employee at the time of the accident.

**WHEREFORE**, the Appeals Board finds that the Order by Administrative Law Judge Bryce D. Benedict, dated November 13, 1997, should be, and the same is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1998.

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BOARD MEMBER

c: John M. Ostrowski, Topeka, KS  
Ronald J. Laskowski, Topeka, KS  
Bryce D. Benedict, Administrative Law Judge  
Philip S. Harness, Director